

The Honorable Barbara Rothstein

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES GRAY and SCOTT HORTON,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware corporation,
and AMAZON.COM SERVICES LLC, a
Washington limited liability company,

Defendants.

NO. 2:22-cv-00800 BJR

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
LEAVE TO FILE AMENDED
COMPLAINT**

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LEAVE TO FILE AMENDED COMPLAINT- 1
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1 The Court should grant Plaintiffs' motion for leave to amend their complaint because
 2 the proposed amended complaint asserts new allegations which cure the deficiencies identified
 3 by the Court and provide the notices applicable when Plaintiffs first registered their Alexa
 4 devices.

5 ARGUMENT

6 A. Amazon did not adequately disclose its use of voice data in its 7 2016 Terms and Notices.

8 Amazon concedes that the Court can and should consider the terms in effect when
 9 Plaintiffs registered their devices. Amazon incorrectly posits, however, the 2016 terms bind
 10 consumers to subsequent changes in the terms based solely on their continued use of Alexa
 11 devices. This provision is without legal effect in the absence of evidence that consumers were
 12 either actually or constructively aware of such revisions and continued to use the devices. *See*
 13 *Sifuentes v. Dropbox, Inc.*, No. 20-CV-07908-HSG, 2022 WL 2673080, at *4 (N.D. Cal. June
 14 29, 2022) (contract which purported to grant right to change terms at will with acceptance
 15 deemed to occur based on continuing use was “irrelevant to determining whether he had actual
 16 or constructive notice of the post- 2011 terms of service.”); *Berman v. Freedom Fin. Network,*
 17 *LLC*, 30 F.4th 849, 856 (9th Cir. 2022) (acknowledging that browsewrap agreements through
 18 which “the user supposedly manifests assent to those terms simply by continuing to use the
 19 website” are generally less enforceable). In the absence of notice that the terms of use have
 20 changed, Amazon cannot preemptively bind users to future terms. Users are entitled to actual or
 21 constructive notice of such changes to be given an opportunity to stop using their Alexa devices
 22 when the terms become unpalatable. Amazon deprived users of this option.

23 That Amazon changed these terms without adequate notice is itself a breach of the duty
 24 of good faith and fair dealing and an unfair or deceptive act under the Washington CPA.

25 The 2016 terms also did not, as Amazon contends, adequately disclose that it was using
 26 voice data to create targeted advertisements. The 2016 terms disclosed that Amazon collected
 data from various sources—none of which expressly identified Alexa recordings and instead

1 focused on Amazon.com and other website interactions, mobile apps, emails, and direct
 2 correspondence with Amazon customer service. PAC ¶¶ 35–36. At most, Amazon disclosed
 3 that it “*might* receive information about you from other sources.” *Id.* at ¶ 35 (emphasis added).
 4 Nowhere does Amazon claim that “voice data” or “voice recordings” from Alexa are included
 5 in the sources of information used to create Interest-Based Ads.

6 Amazon contends that it adequately disclosed its use of voice data because it stated that
 7 “Alexa processes and retains your voice input and other information . . . in the cloud to respond
 8 to your requests and improve our services,” but Amazon fails to explain why a customer would
 9 reasonably interpret “improve our services” to mean “create targeted advertisements.” Instead,
 10 Amazon relies on the 2016 Privacy Notice’s generic representation that it uses “information
 11 you . . . give us in any other way” for “responding to requests, customizing future shopping for
 12 you, improving our stores, and communicating with you” and “to allow third parties to
 13 personalize advertisements we display to you.” But again, Amazon did not disclose that Alexa
 14 voice-captured data was among the sources of information from which it generates third-party
 15 targeted advertising. Amazon could have included Alexa voice data in the disclosure
 16 identifying the scope of information gathered or explicitly identified it as a source of
 17 information from which targeted advertisements are generated; it failed to do so. Instead, it left
 18 consumers with a web of convoluted terms and required them to piece together what
 19 information was gathered and how and when it was used. At best, there is an open question of
 20 fact as to the reasonable interpretation of Amazon’s disclosures that cannot be resolved in
 21 Amazon’s favor at this stage.

22 Terms of use cannot be construed in a vacuum, but must be interpreted not only how the
 23 consumer would construe them substantively, but also how the consumer would encounter and
 24 manifest assent to them: how likely is a consumer to locate the terms? Does the registration
 25 process require multiple steps and multiple documents to understand the full scope of the
 26 terms? Is the consumer required to review them prior to accessing the website or service? How

1 are interrelated notices and terms linked and made available? The purpose of these inquiries is
 2 to determine whether the consumer had actual or constructive notice of the terms. *See Berman*
 3 *v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855–56 (9th Cir. 2022) (“Unless the website
 4 operator can show that a consumer has actual knowledge of the agreement, an enforceable
 5 contract will be found based on an inquiry notice theory only if: (1) the website provides
 6 reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the
 7 consumer takes some action, such as clicking a button or checking a box, that unambiguously
 8 manifests his or her assent to those terms.”); *Weimin Chen v. Sierra Trading Post, Inc.*, No.
 9 2:18-CV-1581-RAJ, 2019 WL 3564659, at *2 (W.D. Wash. Aug. 6, 2019). Courts routinely
 10 reject the application of terms that require multi-step process of clicking links because such
 11 terms are insufficient to put the consumer on constructive notice. *Nguyen v. Barnes & Noble*
 12 *Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014); *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1219–21
 13 (9th Cir. 2019). At the pleading stage, the Court must make all reasonable inferences in
 14 Plaintiffs’ favor; these inferences lead to the conclusion that consumers do not have
 15 constructive knowledge of Amazon’s malleable policies, even accepting that they say what
 16 Amazon contends they do (which they do not). This is particularly true given the sheer number
 17 of interwoven terms and notices, combined with the fact that Alexa use occurs *outside* of
 18 Amazon’s website where the terms are available. Alexa users would not, while using Alexa,
 19 have a reason to search through or stumble across the applicable terms through oral prompts.
 20 *Cf. Lee v. Ticketmaster L.L.C.*, 817 F. App’x 393, 395 (9th Cir. 2020) (user agreed to terms
 21 every time logged into account because “By continuing past this page, you agree to our Terms
 22 of Use” was stated three lines below login button).

23 Moreover, Amazon does not disclose to consumers that it uses voice recordings that are
 24 more than just audio analogs of website text inputs. While there may be a small difference
 25 between searching for toilet paper and clicking “Buy” on Amazon’s website (e.g., the kind of
 26 information Amazon discloses that it uses for interest-based ads) and saying “Alexa, buy toilet

1 paper,” consumers use Alexa for more than transactional shopping, for example, to make
 2 queries that would otherwise be typed into a web browser, call friends and family, or to control
 3 the lights or temperature in their homes. PAC ¶¶ 145–47. Nothing in the terms or notices
 4 discloses that non-transactional interactions constitute “information” given to Amazon that
 5 would be used for marketing purposes. And although Amazon contends that it only uses
 6 transaction records from voice data, the allegations in the proposed Amended Complaint
 7 suggest otherwise as both Plaintiffs allege that they have had been presented with third-party
 8 advertising related to non-transactional voice commands and questions. PAC ¶¶ 91–92, 96–97.

9 Finally, Plaintiffs’ claims are not time-barred - they arise from Amazon’s current and
 10 recent conduct related to Amazon’s material omissions going back to 2016. The statute of
 11 limitations has not expired for claims for ongoing injuries suffered in 2018 and after. But,
 12 Amazon is also liable for its conduct prior to 2018 based on its failure to disclose that it uses
 13 Alexa-captured voice data to serve targeted advertisements. PAC ¶ 99. Amazon actively
 14 concealed, and indeed publicly contradicted, this information, which was not publicly available
 15 until it was revealed by researchers and Amazon admitted the practice, as alleged in the
 16 proposed Amended Complaint. PAC ¶¶ 29–32. The proposed Amended Complaint further
 17 sets forth how it was concealed (through Amazon’s byzantine web of terms and through public
 18 statements that misrepresented Amazon’s actual practices, ¶¶ 20–28, 33–41 and what was
 19 concealed (Amazon’s use of voice data to generate targeted ads ¶¶ 29–32, 42–44).

20 **B. The Research Paper confirms that Amazon’s conduct violates the unfair**
 21 **and deceptive prong of the CPA and shows that the Terms and Notices are,**
 22 **at best, ambiguous.**

23 Plaintiffs’ amended allegations include references to the updated Research Paper which
 24 reported that the majority of surveyed consumers understood Amazon’s public statements to
 25 disclaim use of “voice recordings,” including information derived therefrom, for targeted
 26 advertising. PAC ¶¶ 42–45. Even though Plaintiffs did not personally rely on these
 representations, they were nevertheless injured as a result of Amazon’s deceptive conduct.

1 Plaintiffs allege that they were injured when Amazon used their voice recordings for targeted
 2 advertising without their knowledge or consent. Had Amazon adhered to its public
 3 representations that it did not use voice recordings for targeted advertisements, this would not
 4 have occurred. Here, Plaintiffs' claims arise from Amazon's omissions that it does use voice
 5 recordings for advertising. When a CPA claim is premised on an omission, reliance is
 6 presumed. *Deegan v. Windermere Real Est./Ctr.-Isle, Inc.*, 197 Wash. App. 875, 890, 391 P.3d
 7 582 (2017); *Schnall v. AT & T Wireless Servs., Inc.*, 259 P.3d 129, 137 (Wash. 2011); *Davidson*
 8 *v. Apple, Inc.*, No. 16-CV-04942-LHK, 2018 WL 2325426, at *16 (N.D. Cal. May 8, 2018)
 9 (noting that "federal and state cases interpreting the WCPA" have found "a rebuttable
 10 presumption of reliance" for omission cases which "renders causation unproblematic"). The
 11 public was deceived, and Plaintiffs' injuries arose from Amazon's conduct.

12 Moreover, Amazon's public statements undermine Amazon's current position that its
 13 terms unequivocally disclosed this use. Amazon claims that its 2016 terms disclosed that it
 14 used voice data to generate targeted ads. Subsequent public representations say otherwise. At
 15 the time that these statements were made that did not raise any red flags vis-à-vis Amazon's
 16 terms and notices because consumers and indeed, Amazon, reasonably interpreted the terms as
 17 excluding voice recordings from information used for personalized advertising. At best these
 18 terms were ambiguous and a reasonable consumer could have interpreted the terms to mean
 19 that Amazon was not using any information gathered from voice recordings for this purpose;
 20 the Court must construe them in Plaintiffs' favor at this stage and allow Plaintiffs to amend
 21 their claims.

22 **C. Plaintiffs expressly defined "Voice Data" in response to the Court's express**
 23 **exclusion of transactional information in its order.**

24 Although Plaintiffs contend that Amazon did not adequately disclose its practices
 25 related to the use of voice recordings, Plaintiffs expressly included transactional information in
 26 their definition of voice data in the proposed Amended Complaint because Amazon argued for,
 and the Court adopted, the narrowest construction of that term to exclude transaction data. Dkt.

1 48 at 6, n. 6. This distinction is relevant because Amazon represents—falsely, per Plaintiffs’
 2 contentions—that it only uses the transaction data generated from voice recordings for targeted
 3 advertising. Amazon’s written policies do not make this distinction and when construed in the
 4 context of Amazon’s public representations that it does not use voice recordings for targeted
 5 advertisements, it further calls into question the adequacy of its disclosures.

6 **D. Plaintiffs’ amendments are not futile.**

7 Plaintiffs’ amendments are not futile and the Court should grant leave to file the
 8 proposed Amended Complaint.

9 First, Plaintiffs’ good faith and fair dealing claims are not based on contractual
 10 obligations that do not exist. Although a party only has a duty of good faith and fair dealing
 11 with respect to contracted terms, a party can breach that duty even in the absence of a breach of
 12 the underlying contract. Here, Amazon breached the duty of good faith and fair dealing by
 13 obscuring its practice of use voice data to generate interest-based ads behind terms and notices
 14 that are so vague and ambiguous that the only reasonable inference is that they were
 15 intentionally constructed to confuse and obscure their actual practices. In other words, the
 16 intentionally vague drafting of the terms allowed Amazon to now claim that it always disclosed
 17 its use of voice recordings to avoid legal liability while previously disclaiming advertising
 18 usage of voice recordings when under public scrutiny. The purpose of the duty of good faith
 19 and fair dealing is to ensure that a party with discretionary authority to set a contract term to
 20 later interpret those terms in a manner contrary to who the other party understood them. *See*
 21 *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wash. App. 732, 738 (1997). The
 22 proposed amendments are not futile because Plaintiffs allege that Amazon has used its vague
 23 disclosures to simultaneously benefit from not only the impression, but also express
 24 representations, that it does not use voice recordings for targeted ads, while in fact doing the
 25 opposite.
 26

1 Second, Plaintiffs' WCPA claim does not fail because Plaintiffs allege that Amazon's
 2 disclosures were inadequate to disclose their actual practices of using voice recordings for
 3 targeted advertisements and accordingly, were not able to avoid injury by avoiding the product.
 4 Amazon can use Plaintiffs' information, including voice recordings, but only if that practice is
 5 adequately disclosed, which it was not. Moreover, Plaintiffs' allegations do meet the
 6 particularities of Rule 9(b). Amazon claims that it uses the downstream transaction data
 7 generated from voice recordings for targeted ads, not the voice recordings themselves. But
 8 Plaintiffs allege that they received targeted advertisements related to queries that were not
 9 transactions. PAC ¶¶ 91–93, 96–98. Plaintiffs have alleged injury stemming from Amazon's
 10 unfair and deceptive practice: that their voice recordings were used without their consent and
 11 they could not have avoided injury by reading Amazon's vague terms and notices.

12 Third, Plaintiffs' intrusion on seclusion claim is not futile because Plaintiffs refute that
 13 they consented to the use of Alexa voice recordings for targeted advertisements when they
 14 initially registered their Alexa devices.

15 Finally, Plaintiffs agree that they have not included any additional factual allegations
 16 pertaining to their personality rights claim and submit only that the Court's ruling was premised
 17 on a material rephrasing of the statute to require that Plaintiffs' voices be used *in*
 18 advertisements, when the statute requires only that their voices be used *for* purposes of
 19 advertising products. RCW § 63.60.050. In this context, "in" and "for" have different meanings
 20 and cannot be substituted. Amazon used Plaintiffs' voice recordings for purposes of advertising
 21 even if their voices were not utilized in the ads. Moreover, Plaintiffs included this claim in their
 22 proposed Amended Complaint to ensure that they did not waive any rights to appeal the
 23 Court's ruling.

24 CONCLUSION

25 For all the reasons set forth above and in Plaintiffs' motion for leave to amend, the
 26 Court should grant the motion and permit Plaintiffs to file their proposed Amended Complaint.

DATED this 7th day of April, 2023.

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